Supreme Court, U.S.
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No. 03-1431

IN THE

Supreme Court of the United States

HOSPITALITY MANAGEMENT ASSOCIATES, INC., *et al.*,

Petitioners,

v.

SHELL OIL COMPANY d/b/a
SHELL CHEMICAL COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION FOR RESPONDENT HOECHST CELANESE CORPORATION

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QUESTION PRESENTED

Did the South Carolina Supreme Court hold correctly that a final Tennessee state court judgment approving a nationwide class action settlement was entitled to full faith and credit under Article IV of the United States Constitution where (i) that judgment was final and entitled to *res judicata* effect in Tennessee; and (ii) all relevant matters set forth in that judgment, including jurisdiction, adequacy of notice, adequacy of representation and the fairness and reasonableness of the settlement, were fully litigated in and finally decided by the Tennessee court.

STATEMENT PURSUANT TO RULE 29.6

Respondent CNA Holdings, Inc., formerly known as Hoechst Celanese Corporation, ("Celanese"), is an indirect, wholly-owned subsidiary of Celanese AG. Celanese AG is a publicly traded company.

EXPLANATION OF RECORD CITES

"Petition" refers to the Petition for Writ of Certiorari.

"Petition App. __" refers to the Appendix attached to the Petition for Writ of Certiorari.

"Celanese App. __" refers to the Appendix attached to Respondent Hoechst Celanese Corporation's Brief In Opposition.

"R. __" refers to the Record on Appeal filed with the Supreme Court of South Carolina.

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COUNTERSTATEMENT OF THE CASE

By this case, Petitioners seek to contravene established full faith and credit law, claiming that they may collaterally attack and relitigate the merits of a final judgment approving a nationwide polybutylene (*i.e.*, plastic) plumbing class action settlement agreed to by Celanese, Respondent Shell Oil Company ("Shell") and the plaintiff class in *Cox v. Shell Oil Co.*, C.A. No. 18,844 (Chancery Ct. Obion Cty., Tenn.) ("*Cox*").[1] The lower courts in South Carolina held that well-settled authority and the Full Faith and Credit Clause of the United States Constitution prohibited this collateral attack on the *Cox* final order and judgment. Petitioners offer nothing to justify this Court's review of the South Carolina courts' rulings.

The $950 million settlement approved by the *Cox* court (the "*Cox* Settlement" or "Settlement") — one of the largest property damage settlements in history — brought to a conclusion over a decade of litigation relating to polybutylene plumbing in courts across the United States. The *Cox* Settlement has enabled hundreds of thousands of property owners to obtain complete relief (*i.e.*, replacement of leaking polybutylene plumbing, as well as reimbursement for any damages allegedly caused by such leaks, at no cost to the consumer). Petitioners are class members, but rather than avail themselves of this relief, Petitioners instead pursued this lawsuit. However, the November 17, 1995 final order and judgment approving the *Cox* Settlement (the "*Cox* Final Order and Judgment") bars property owners like Petitioners here, who have not opted out of the class, from

1. Petitioners have also challenged the final judgment approving the settlement agreed to by Respondent E.I. duPont de Nemours & Company ("DuPont") in *Spencer v. Shell Oil Co.*, C.A. No. CV-94-047 (Cir. Ct., Greene Cty., Ala.) ("*Spencer*"). Celanese was not a party to the *Spencer* settlement, and thus did not seek to have that final judgment accorded full faith and credit. Celanese does not question that *Spencer* should be entitled to full faith and credit under settled law, but that determination is not relevant to whether the South Carolina Supreme Court ruled correctly that the *Cox* final judgment was entitled to full faith and credit.

pursuing a lawsuit relating to polybutylene plumbing against Celanese or Shell.

Under established authority of this Court, the scope of review on a full faith and credit motion is whether the foreign court fully litigated and finally decided all issues relevant to the judgment. *See Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982) ("'a judgment is entitled to full faith and credit — even as to questions of jurisdiction — when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment'") (citation omitted).

Following this settled law, the South Carolina Supreme Court, upholding the ruling of the Court of Common Pleas, Charleston County, South Carolina (the "Trial Court"), ruled that the *Cox* Final Order and Judgment was entitled to full faith and credit, and that Petitioners' claims were barred. *Hospitality Mgmt. Assoc., Inc. v. Shell Oil Co.*, 591 S.E.2d 611 (S.C. 2004) (Petition at 1a-27a); *Hospitality Mgmt. Assoc., Inc. v. Shell Oil Co.*, No. 95-CP-10-1948 (Ct. Common Pleas, S.C. June 14, 2002) (Petition at 28a-63a). In so holding, the South Carolina Supreme Court found that all matters contained in and central to the *Cox* Final Order and Judgment, including jurisdiction, adequacy of notice, adequacy of representation, and the fairness and reasonableness of the settlement, were fully litigated and finally decided by the *Cox* court. As such, the court ruled that further litigation was prohibited by the full faith and credit clause. Celanese respectfully urges the same result here.

As shown below, the South Carolina Supreme Court's decision does not conflict with any decision of this Court, a United States court of appeal or a state court of last resort. *See* U.S. Sup. Ct. R. 10. To the contrary, this Court, and every federal court of appeal and state appellate court to have recently addressed the issue, have held uniformly that in determining full faith and credit the permissible scope of review is whether

the relevant matters set forth in the foreign judgment were fully litigated and finally decided by the foreign court.

The few cases cited by Petitioners as alleged conflicting authority stand for the non-controversial proposition that collateral review is appropriate only where, unlike in *Cox*, a matter central to the prior judgment was not fully litigated and finally determined in the foreign court. Indeed, Petitioners' central authority, *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd in part per curiam by an equally divided Court*, 539 U.S. 111 (2003), concerns the rights of class members after a settlement fund had been exhausted, an issue which was not litigated or decided in the original action and which is completely irrelevant to the instant case where the *Cox* Settlement continues to operate and to pay all valid claims.

As such, Petitioners offer nothing to contradict settled authority barring relitigation of the *Cox* case and Settlement, and offer nothing to justify this Court's review of the matter.

I. The *Cox* Settlement

In 1995, Celanese and Shell agreed without admitting liability to commit at least $950 million to provide new plumbing systems and property damage compensation to class members with qualifying leaks. (Celanese App. 11a, 17a-18a.) Under the terms of the Settlement, if the initial fund should ever be exhausted, either (a) Celanese and Shell will provide additional funds, or (b) those class members who have not received their claimed benefits will have the right to pursue their claims against Shell and Celanese as they did prior to the Settlement. (*Id.* at 11a-12a.) The Settlement has paid hundreds of millions of dollars on claims to date, and continues to operate and pay claims. (R. 2209; R. 2344.)

The *Cox* Settlement provides for recurring notice to the class, every three years through the year 2009, to ensure that

full benefits are delivered to the class and to permit subsequent opt out periods, which occurred in 1999, 2002 and will occur again in 2005. (*See* Celanese App. 18a.)

II. Approval Of The *Cox* Settlement

The *Cox* Final Order and Judgment was the end result of intense litigation and arms-length negotiations over a long period of time among all of the various interested parties, and included a two-week long settlement conference mediated by a California state court judge. Every aspect of the Settlement was litigated and decided by the *Cox* court, including, among other things, jurisdiction, the notice program, the adequacy of representation, and the fairness of the Settlement.

A. *Litigation In Cox Concerning Adequacy Of Representation*

On several occasions, the *Cox* court addressed and determined the adequacy of representation of the class. For example, in its order certifying the class, the court recognized that class counsel "included highly qualified and well-regarded lawyers with extensive class action and complex litigation experience, as well as lawyers with vast experience in polybutylene plumbing litigation." (Celanese App. 15a; *see also id.* at 30a.) The issue was addressed again by the court during the fairness phase of the proceedings. (R. 2244.) At the same time, the court addressed the adequacy of the class representatives, and found them to be adequate. (R. 2251, 2254, 2258.) In addition, the issue was litigated at length in connection with objections to the application for attorneys' fees by class counsel. (R. 2472-75; R. 2483-85.) The *Cox* court, presented with evidence that the requested attorneys' fees in the *Cox* Settlement represented only 5% of the minimum class recovery, rejected such challenges. (Celanese App. 13a.)

Numerous challenges to the adequacy of representation were also raised through allegations of collusion among counsel and the parties. (*See, e.g.*, R. 2773; R. 2787-88.) These accusations were rejected as meritless, as the court found that

"the settlement agreement is the result of good faith, arms-length and non-collusive negotiations." (R. 2735.)

Finally, Judge Silver of the Superior Court of California, Monterey who, pursuant to joint orders of several courts before which polybutylene plumbing cases were pending, mediated an intensive settlement conference between the various parties, determined that the class had been adequately represented. (R. 2644-45; Celanese App. C; Celanese App. 15a-16a.)

B. *Litigation In Cox Concerning The Proposed Notice Program*

The *Cox* notice program, which cost over $10 million in 1995, and which includes an additional $18 million to be spent on continuing notice over the life of the settlement, was at the time the largest property damage class action settlement notice program in the history of American jurisprudence. (R. 2381-82.) The $10 million campaign provided at least three exposures of the notice to more than 89% of the U.S. population over twenty-five years of age. (R. 3215; R. 3001.) The notice program thus reached most property owners in the United States, including virtually all likely class members. (R. 3217.)

Notwithstanding its unprecedented extent, numerous objections to the notice program were lodged with the *Cox* court.[2] To address these objections, the court held multiple hearings where all interested parties were given the opportunity to be heard and where evidence both in support of and in opposition to the notice program was submitted. (Celanese App. 19a, 23a.) As the *Cox* court ultimately ruled after hearing argument and receiving this evidence, the *Cox* notice program "met and exceeded" all constitutional requirements, as it was "one of the most comprehensive class notice campaigns ever undertaken." (*Id.* at 24a, 32a; R. 2242, 2251.)

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2. *See* R. 2817; R. 2468; R. 2858; R. 2864-65; R. 2885.

C. *Litigation In Cox Concerning The Settlement's Fairness, Reasonableness And Adequacy*

On November 8-9, 1995, the *Cox* court conducted a fairness hearing on the proposed settlement which was open to all interested parties. (Celanese App. 8a; Petition at 32a.) At the hearing, numerous briefs in support of and in opposition to the *Cox* Settlement were presented, evidence was received, and extensive argument was heard over a two day period. In addition, a number of class members either appeared to voice their objections to the Settlement or sent letters supporting or objecting to the Settlement. (Celanese App. 9a.)

Further, the *Cox* court accepted into evidence the Recommendation of Judge Silver. (R. 2644-45; Celanese App. C; Celanese App. 15a-16a.) In recommending that the *Cox* Settlement receive final approval, Judge Silver noted, among other things, that: (1) the negotiations were adversarial and arms-length; (2) the settlement created "an even handed evaluation of claims and requests for treatment . . . and a fair method of resolution of disputes"; and (3) attorneys' fees were determined completely independent of all discussions on the terms of the Settlement. (*Id.* at 14a, 42a-43a, 46a.)

On November 17, 1995, the *Cox* court entered its Final Order and Judgment approving the Settlement. In so doing, the court stated that "[i]n independently determining to approve the Settlement and the Application, the Court has considered the substance of all objections to the Settlement, whether timely, qualified or not, including those . . . that have since been withdrawn or stricken." (*Id.* at 26a.) Thus, each and every objection which was raised was considered by the *Cox* court before approving the Settlement.[3]

III. The *Cox* Final Order And Judgment Has Been Given Full Faith And Credit By Courts Nationwide

Because every issue relevant to the approval of the *Cox* Final Order and Judgment was fully litigated and decided by

3. All appeals from the *Cox* Final Order and Judgment have been dismissed. (R. 3565-66.)

the Tennessee court, that order and judgment has uniformly been granted full faith and credit by courts nationwide. *See Nobl Park, L.L.C. v. Shell Oil Co.*, No. 00-2-03776-1 (Wash. Super. Ct. Nov. 26, 2002); *Fry v. Hoechst Celanese Corp.*, No. 95-6414-CA-11 (Fla. Cir. Ct., Dade Cty. July 17, 1996) (R. 3567); *Hop v. Hoechst Celanese Corp.*, No. 95-CV-004930 (Wis. Cir. Ct., Milwaukee Cty. Mar. 28, 1996) (R. 3569; R. 3947); *Farr v. RCP Invs.*, CV 93-08807 (Ariz. Super. Ct., Maricopa Cty. Jan. 29, 1996) (R. 3571); *Fry v. Hoechst Celanese Chemical Group*, No. 95-2225-CA-B (Fla. Cir. Ct., Marion Cty. Jan. 29, 1996) (R. 3944); *Nothorn v. Shell Oil Co.*, No. 661692 (Super. Ct., San Diego Cty., Cal. Jan. 26, 1996) (R. 3578); *Spencer v. Shell Oil Co.*, CV94-047 (Ala. Cir. Ct., Greene Cty. Dec. 4, 1995) (R. 3583).

IV. Proceedings In The Trial Court

Petitioners are all members of the *Cox* settlement class who did not opt out of the Settlement. (Petition App. at 33a.) Instead of seeking relief under the Settlement, Petitioners sought damages from Respondents under various theories of liability, alleging that they own commercial and residential properties in South Carolina containing defective polybutylene plumbing. (*See id.* at 2a.) Petitioners did not sue any of the various companies that designed, manufactured, sold or installed the different types of polybutylene plumbing and components thereof. Rather, Petitioners sued only some of the raw material suppliers, such as Shell, Celanese and DuPont, that provided the resins used by other companies in the manufacture of certain components for the different types of polybutylene plumbing.[4] (*See id.*)

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4. Contrary to Petitioners' assertion (Petition at 3), Celanese did not market or manufacture polybutylene plumbing, but rather Celanese supplied a raw material, known as Celcon, which was used by certain manufacturers to fabricate insert fittings that joined pieces of pipe in some types of polybutylene plumbing, and is still used today successfully in hundreds of applications, including properly designed potable plumbing applications. (*See* Petition App. at 2a n.1.)

A. *Respondents' Motions For Summary Judgment*

On May 1, 2001, Celanese and the other Respondents moved for summary judgment on full faith and credit grounds. Specifically, Celanese argued that Petitioners' claims were fully resolved pursuant to the *Cox* Final Order and Judgment. (*See* R. 232, 4412.) In a detailed, thirty page order, the Trial Court granted Respondents' motions, ruling expressly that:

> The Supreme Court does not allow a state court to examine *de novo* or undertake such broad collateral review of another state court's judgment before according it full faith and credit. Rather, the permissible scope of review here is to examine the findings of the *Cox* and *Spencer* courts, subject to the limited collateral review allowed by the Supreme Court, and ascertain whether the Tennessee and Alabama courts extended the relevant due process to the nationwide class. The record unmistakably shows that the courts fully considered all due process issues relating to its jurisdiction over absent class members and determined that jurisdiction existed. Thus, the judgments are entitled to full faith and credit in this Court as guaranteed by the Constitution.

(Petition App. at 42a.) Petitioners appealed that order directly to the South Carolina Supreme Court.

V. The South Carolina Supreme Court's Decision

Consistent with established jurisprudence of this Court, the South Carolina Supreme Court held that the *Cox* Final Order and Judgment was entitled to full faith and credit, and affirmed the dismissal of Petitioners' claims. (Petition App. at 26a-27a.) The court rejected Petitioners' contention that the court was required to conduct a broad collateral review of the *Cox* Final Order and Judgment before ruling on full faith and credit, as such review would permit one state court to "second-guess[] the fully litigated decisions of our sister courts . . ." (*Id.* at 18a.) The court concluded that:

> [proper] procedures were not only in place in . . . *Cox*, but were also consciously and steadfastly utilized to accord minimum due process to the absent class members. Consequently, we hold the trial court correctly accorded full faith and credit to the . . . *Cox* order[].

(*Id.* at 27a.)

REASONS FOR DENYING THE PETITION

I. THE SOUTH CAROLINA SUPREME COURT HELD CORRECTLY THAT THE *COX* FINAL ORDER AND JUDGMENT IS ENTITLED TO FULL FAITH AND CREDIT, AND THAT PETITIONERS' CLAIMS WERE BARRED

The United States Constitution provides that "[f]ull faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1.[5] This Court has explained that full faith and credit "generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it." *Durfee v. Duke*, 375 U.S. 106, 109 (1963). As this Court made clear in *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), full faith and credit applies equally to judgments entered in class actions as to those entered in individual lawsuits: "[A] judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit. . . ." *Id.* at 374.

A. *The South Carolina Supreme Court Held Correctly That The Scope Of Review On A Full Faith And Credit Motion Is Limited Expressly To Whether The Foreign Court Litigated And Decided All Issues Relevant To The Foreign Judgment*

Petitioners argue that the South Carolina Supreme Court should have permitted broad collateral review of the *Cox* Final

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5. The requirement that federal courts give full faith and credit to state court judgments is codified at 28 U.S.C. Section 1738.

Order and Judgment prior to ruling on full faith and credit. According to Petitioners, unless absent class members are entitled to litigate *de novo* any objections which they may have to a class action settlement, absent class members would have no "meaningful avenue" to protect their due process rights.[6] (Petition at 2-3, 9.) In making this argument, Petitioners ignore the law and the very purpose of the Full Faith and Credit Clause.

This Court does not allow a court to examine *de novo* or undertake broad collateral review of a foreign judgment before determining whether it is entitled to full faith and credit. Rather, the scope of review permissible with respect to any issue relevant to a judgment or order of a sister state is limited: "'a judgment is entitled to full faith and credit — even as to questions of jurisdiction — when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.'"[7]

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6. Petitioners claim that because they did not personally appear in *Cox*, they are entitled to attack collaterally the *Cox* court's findings. (Petition at 13.) In so arguing, Petitioners ignore the representational nature of a class action. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985) (explaining that "a 'class' or 'representative' suit was an exception to the rule that one could not be bound by judgment *in personam* unless one was made fully a party in the traditional sense") (citing *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940)).

7. Petitioners argue that the jurisdictional findings in the *Cox* Final Order and Judgment are "self-serving jurisdictional recitals," and thus not entitled to full faith and credit. (Petition at 13-14.) Petitioners are wrong. First, jurisdiction was litigated and decided in *Cox*. Thus, the findings of jurisdiction by the *Cox* court are not mere recitals. Second, the cases Petitioners cite for their proposition make clear that where, as here, the prior court litigated and decided jurisdiction, it may not be relitigated (even if, unlike here, the jurisdictional ruling was erroneous). *See Williams v. North Carolina*, 325 U.S. 226, 230 n.6 (1945) ("We have not here a situation where a State disregards the adjudication of another State on the issue of domicil squarely litigated in a truly adversary proceeding"); *Peoples Nat'l Bank v. Manos Bros., Inc.*, 84 S.E.2d 857, 866 (1954) (noting expressly that the prior court's decree "contained no recital or express finding" concerning jurisdiction).

Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 706 (1982) (quoting *Durfee*, 375 U.S. at 111). *Accord Milliken v. Meyer*, 311 U.S. 457, 462 (1940) (". . . the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based . . . Whatever mistakes of law may underlie the judgment") (citation omitted); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938) ("After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined").

That the foreign judgment concerns a class action settlement does not alter this settled rule. Indeed, in *Matsushita*, this Court reversed a decision of the Ninth Circuit Court of Appeals that denied full faith and credit to a class action settlement approved by a Delaware state court. In holding that the Delaware judgment was entitled to full faith and credit, the Court found that the procedural due process requirements set forth in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) — adequate notice, an opportunity to be heard and participate, the right to opt out, and adequate representation — had been litigated in and decided by the Delaware court:

> [T]he Court of Chancery found, and the Delaware Supreme Court affirmed, that the settlement was "fair, reasonable and adequate and in the best interests of the . . . Settlement class" and that notice to the class was "in full compliance with . . . the requirements of due process." . . . The Court of Chancery "further determined that the plaintiffs, . . . as representatives of the Settlement Class, have fairly and adequately protected the interests of the Settlement Class."

516 U.S. at 378-79 (citations omitted). Having determined that the Delaware court had considered and addressed each of the

relevant due process elements necessary to bind absent class members, the Court reviewed the issue no further. *Id.* at 379.

Moreover, if Petitioners' theory was the law, class action judgments would never be truly final, as they would always be subject to collateral attack in multiple fora by any dissatisfied class member who had not actually appeared in the initial case. *See Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943) (explaining that the "clear purpose" of full faith and credit is "to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered").

Following this settled authority, the South Carolina Supreme Court held that the proper scope of review here is "limited" to whether the due process issues were fully litigated and decided by the foreign court. The court explained that broad collateral review "would run counter to the class action goals of efficiency and finality to allow successive reviews of issues that were, in fact, fully and fairly litigated in the rendering court." (Petition App. at 18a.) Applying this appropriate scope of review to the *Cox* Final Order and Judgment, the South Carolina Supreme Court concluded that the *Cox* court had adopted and utilized appropriate procedures to safeguard the due process rights of the absent class members. Having reached this conclusion, the court reviewed the matter no further, ruling that:

> the proper scope of collateral review of a rendering court's rulings on the due process requirements for binding absent class members is one limited to a consideration of whether the procedures in the prior litigation allowed a full and fair opportunity to litigate the due process issues.

(*Id.* at 26a-27a.) As such, the South Carolina Supreme Court's decision is fully consistent with prior holdings of this Court.

B. *The South Carolina Supreme Court Ruled Correctly That The Cox Court Had Adopted And Utilized Appropriate Procedures To Protect The Rights Of The Absent Class Members*

The South Carolina Supreme Court properly concluded that the *Cox* court had adopted and utilized appropriate procedures to safeguard the absent class members' due process rights, as the court found that all issues central to the *Cox* Final Order and Judgment were fully litigated and finally decided by the Tennessee court. As shown below, Petitioners' assertions are simply collateral attacks aimed at relitigating the *Cox* case and Settlement.

1. All Issues Concerning Subject Matter And Personal Jurisdiction Were Litigated And Decided By The *Cox* Court

Despite Petitioners' conclusory, single sentence assertion that personal jurisdiction was not litigated in *Cox* (Petition at 15), the Trial Court reviewed the massive record of the *Cox* proceeding, and found that the *Cox* court "fully considered all due process issues relating to its exercise of jurisdiction over absent class members and determined that jurisdiction existed." (Petition App. at 47a.) Indeed, the *Cox* court heard argument concerning personal jurisdiction, and in its Final Order ruled that: "[t]he Court has jurisdiction over all claims asserted in the Action on behalf of all . . . members of the Settlement Class." (Celanese App. 33a.) Therefore, this issue is not subject to collateral review.

Petitioners have not even attempted to challenge the Trial Court's finding, affirmed by the South Carolina Supreme Court, that the "issue of subject matter jurisdiction was fully contested, briefed, and argued before being finally decided by the *Cox* . . . court[]." (Petition App. at 46a.) This is not surprising, as the uncontradicted record below demonstrates that the *Cox* court issued a reasoned and thorough order rejecting a subject matter jurisdiction challenge. (R. 2465; R. 2385; *see also* Celanese App. 33a.) Therefore, this issue was fully litigated and finally decided, and is not subject to collateral review.

2. The South Carolina Supreme Court Properly Found That The Adequacy Of The Notice Program Was Litigated And Decided By The *Cox* Court

The record below demonstrated conclusively that the extensive *Cox* notice program was the subject of numerous and detailed briefs, including objections, several adversarial hearings, and several court orders. (Petition App. at 48a.) After considering each of the objections, the *Cox* court found that the notice program provided the best practicable notice under the circumstances, and that it "met and exceeded the requirements of the United States Supreme Court, Tennessee's Rule 23, due process and the Constitution, as construed in [*Shutts*] and its progeny." (Celanese App. 24a.) Based on this record, the South Carolina Supreme Court found that "the *Cox* court [had] designed and utilized various procedural safeguards to guarantee sufficient notice" to the absent class members, and that well-established principles of full faith and credit prohibited further review. (Petition App. at 22a.)

Petitioners seek to relitigate the issue, contending that the *Cox* notice program was inadequate. However, as shown below, the arguments which Petitioners raise here were rejected by both the South Carolina Supreme Court and the Trial Court because, among other things, the *Cox* court had addressed and decided each of these contentions, and thus relitigation was barred.

First, Petitioners claim erroneously that the content of the *Cox* notice was inadequate because it allegedly did not contain information concerning the assignment of rights to defendants and the exact amount of attorneys' fees.[8] (Petition at 20-21.) However, the Trial Court found, and the South Carolina Supreme Court affirmed, that these issues were fully litigated and finally decided by the *Cox* court. (Petition App. at 55a.) The record

8. Contrary to the Petition, the *Cox* Settlement provides more generous relief than that offered on a voluntary basis through the Plumbing Claims Group ("PCG"), as the PCG generally does not pay for damages, just a replumb.

below demonstrates that the *Cox* court rejected objections to notice similar to those Petitioners raise here, and determined that the "notice accurately and adequately advised [class members] of this action; the proposed Settlement and its terms, features and benefits; their rights and options; and the applicable procedures and deadlines for exercising them." (R. 2251.) Moreover, the record — which Petitioners ignore — demonstrates that the *Cox* notice complied fully with the requirements of procedural due process, as the notice informed potential class members of (1) the existence of the action, including a description of the pending litigation, polybutylene plumbing and the criteria for inclusion in the settlement class; (2) the requirements for opting out; (3) the requirements for entering an appearance before the court; and (4) the applicability of a final judgment to all members who do not opt out of the class. (*See* R. 3960-61; Petition App. at 20a-21a; Celanese App. 24a.) Thus, relitigation of this issue is not permitted under the Full Faith and Credit Clause.

Second, Petitioners claim erroneously that the *Cox* notice program was inadequate because they did not actually receive notice of the *Cox* Settlement. (Petition at 17-20.) However, the Trial Court found, and the South Carolina Supreme Court affirmed, that this very issue had been fully litigated and decided by the *Cox* court. (Petition App. at 52a-53a; *see, e.g.*, R. 3684; R. 2858.) As the Trial Court concluded:

> The record clearly reveals that the *Cox* and *Spencer* courts carefully considered the issue of how to best provide notice to unknown class members and that the issue was fully and fairly litigated. As such, their decisions that the respective notice campaigns provided the best practicable notice under all the circumstances are not subject to relitigation in this Court. . . .

(Petition App. 22a.) Indeed, in determining that the *Cox* notice campaign met and exceeded all due process requirements, the *Cox* court found that: "Since not all Settlement Class Members were known or readily identifiable, the notice program

implemented in this case combined multimedia publication (newspapers, magazines, radio and television), individual mailed notice, ongoing press and media outreach, and a toll-free telephone information service." (Celanese App. 19a-20a.) Thus, further litigation of this issue is barred by the Full Faith and Credit Clause.

Moreover, even if Petitioners were permitted to relitigate the issue, they have misstated the law. As the South Carolina Supreme Court recognized, this Court does not require that every class member receive personal notice. Rather, notice must be "the best practicable, 'reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" (Petition App. at 21a) (quoting *Shutts*, 472 U.S. at 812.) As shown above, the extensive multi-media notice program used in *Cox* clearly met this standard, as it was one of the most comprehensive class notice campaigns ever undertaken. The notice experts who designed and implemented the notice program testified in the *Cox* court that notice would reach nearly every class member a number of times. Based on this evidence, which Petitioners do not contest, the *Cox* court approved the notice as exceeding the constitutional requirement for adequate notice. (Celanese App. 19a-24a.) *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317-18 (1950) (in affirming notice by publication, the Court held that "impracticable and extended searches are not required in the name of due process").

3. The South Carolina Supreme Court Properly Found That The Adequacy Of Representation Was Litigated And Decided By The *Cox* Court

The record below demonstrated clearly that all objections concerning the adequacy of both *Cox* class counsel and the *Cox* class representatives were fully considered and finally decided by the *Cox* court. Indeed, in its Final Order, the *Cox* court rejected objections similar to those Petitioners raise here and found that "[t]he *Cox* Class Counsel maintained the highest standards of

professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case." (Celanese App. 30a.) Likewise, the *Cox* court considered and determined that the class representatives were adequate. (R. 2258; Celanese App. 24a.) Consistent with its limited scope of review, the South Carolina Supreme Court concluded that "there obviously were procedures in place to ensure adequate representation in . . . *Cox*, and that such procedures were implemented throughout." (Petition App. at 26a.)

Nonetheless, Petitioners seek to relitigate adequacy of representation here. Once again, both the South Carolina Supreme Court and the Trial Court rejected nearly identical arguments to those raised by Petitioners here because, among other things, the *Cox* court had addressed and decided each of these contentions, and thus relitigation was barred.

First, Petitioners claim erroneously that the attorneys' fees awarded to *Cox* class counsel created a conflict of interest between class counsel and the class. (*Id.* at 24-25.) However, the Trial Court found, and the South Carolina Supreme Court affirmed, that this very issue was fully litigated and finally decided by both the *Cox* court and Judge Silver.[9] (Petition App. at 26a, 57a-59a.) As the *Cox* court found: "There is no factual basis for the asserted objection that there is any conflict of interest with respect to the *Cox* Class Counsel." (Celanese App. 30a.) To the contrary, the *Cox* court determined that attorneys' fees represented only 5% of the minimum class recovery — an amount substantially less than the percentage of counsel fees awarded in similar cases. (*Id.* at 13a.) Moreover, the *Cox* court found that fees paid to class counsel were separate and apart

9. Petitioners claim erroneously that "*Spencer* counsel" were paid "to drop their objections" to the *Cox* Settlement. (Petition at 5, 24-25.) This objection was considered and rejected by both the *Cox* court and Judge Silver before any fees were awarded. (*See* Petition App. at 60a-61a; Celanese App. 30a, 35a, 45a-46a.) Thus, this very issue was fully litigated and finally decided.

from the settlement, and thus did not affect the amount of money available to class members under the settlement. (*Id.*) Thus, relitigation of this issue is barred by the Full Faith and Credit Clause.[10]

Second, Petitioners make a number of conclusory and erroneous assertions regarding *Cox* class counsel's conduct. (Petition at 26-27.) However, the Trial Court found, and the South Carolina Supreme Court affirmed, that the *Cox* court heard and rejected essentially identical objections concerning the conduct of class counsel. (Petition App. at 26a, 57a; Celanese App. 44a-46a.) As the South Carolina Supreme Court noted: "The *Cox* court responded specifically to various objections to class counsel's alleged conflicts of interest and found such allegations to be without factual support. Indeed, the court commented on class counsel's professionalism in protecting and promoting the interests of the class." (Petition at 26a.) Thus, this issue was fully litigated and finally decided by the *Cox* court, and is not subject to collateral review.

Third, Petitioners claim that the *Cox* class representatives did not adequately represent the interests of the entire class because under *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), subclasses should have been created to represent the interests of future claimants.[11] (Petition at 23, 27-28.) However,

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10. Contrary to the Petition, the *Cox* Settlement approval was not conditioned on "the separate settlement of Plaintiff's counsels' private inventory of claims." (Petition at 24.) Indeed, in *Cox*, the judge who oversaw the final two week negotiating session rejected this exact objection: "There was absolutely NO "private inventory sale" conditioned on class settlement. . . . [M]onitoring this issue was one of my responsibilities." (Celanese App. 44a-45a.) Likewise, the *Cox* court found that "[t]here is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the *Cox* Settlement." (*Id.* at 30a.)

11. Even if (contrary to law and fact) the *Cox* Final Order and Judgment were deemed erroneous under *Amchem*, it would still be entitled to full faith and credit. *See Underwriters*, 455 U.S. at 709 n.16 (Cont'd)

the Trial Court found, and the South Carolina Supreme Court affirmed, that the *Cox* court fully considered and determined that the class representatives were more than adequate, and that no subclasses were necessary. (Petition App. at 61a-63a.) Significantly, as the evidence before the Trial Court demonstrated, the class representatives' ability to adequately represent future claimants was the subject of intensive litigation in the *Cox* court. (*See, e.g.*, Petition App. at 26a; R. 2257-58; R. 3222; R. 3516-17; R. 3463; R. 2385; R. 3018-19; R. 3291.) Moreover, it would appear that Petitioners lack standing to raise this argument, as Petitioners each claim to have suffered an injury.[12] (*See* Petition App. at 2a.)

Further, assuming *arguendo* (and contrary to controlling law) that Petitioners were entitled to relitigate the adequacy of the named plaintiffs in *Cox*, Petitioners' claim is meritless. First, *Amchem* was decided more than 18 months after *Cox*, and cannot be applied retroactively to reopen the *Cox* Final Order and Judgment.[13] Second, nothing in *Amchem* even suggests that the *Cox* Settlement has constitutional defects. *Amchem* concerned a direct appeal from a judgment approving a nationwide class action settlement that sought to resolve all claims arising from alleged exposure to the defendants' asbestos-containing

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(Cont'd)

("an error of law . . . does not deprive its decision of the right to full faith and credit, so long as that court fully and fairly considered its jurisdiction to adjudicate the issue").

12. *See Shutts*, 472 U.S. at 804 ("One of these prudential limits on standing is that a litigant must normally assert his own legal interests rather than those of third parties").

13. *Compare Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (holdings of the Supreme Court are controlling and must be given "full retroactive effect in all cases *still open on direct review*") (emphasis added), *with James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541-42 (1991) ("Of course, retroactivity in civil cases must be limited by the need for finality . . . Public policy dictates that there be an end of litigation . . . that matters once tried shall be considered forever settled as between the parties") (citations omitted).

products, regardless of whether the class members had contracted an asbestos-related disease. In reviewing the proposed settlement, this Court discussed potential problems with the proposed settlement, including, among other things, that it: (1) provided compensation in a fixed range without any adjustment for future inflation; (2) capped the number of claims eligible for payment in a given year; and (3) limited the number of opt outs in future years. 521 U.S. at 626-28. The Court was also concerned that future claimants would be denied their right to opt out of the settlement because notice had been disseminated before they had incurred any injury. *Id.* at 628. The *Cox* Settlement has none of these problems.

As the Trial Court found and the South Carolina Supreme Court affirmed, the issues presented in *Amchem* are irrelevant to the *Cox* Settlement, as (i) the relief under the settlement is provided regardless of inflation; (ii) there is no cap on the number of claims eligible for payment in any year; (iii) there are subsequent notice and opt out periods for future claimants, and no limitation on the number of opt outs; and (iv) if future eligible claimants are not afforded the relief provided by the *Cox* Settlement because the fund is exhausted, those claimants retain and may pursue their claims against Celanese and Shell with any applicable limitations periods tolled.[14] (Petition App. at 62a-63a; *see also* R. 2280-2300.) Thus,

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14. Contrary to Petitioners' contention (Petition at 25-26), there is no conflict of interest between commercial property owners and single unit property owners because all eligible claimants are similarly situated and receive identical relief: a replacement of leaking polybutylene plumbing in any eligible unit, as well as reimbursement for any damages allegedly caused by such leaks. (*See* Celanese App. 17a.) Moreover, the issue of whether non-leaking properties or units should receive relief was extensively litigated in *Cox*, and the *Cox* court determined that limiting relief to properties or units which are leaking was proper. (*Id.* at 11a.) Thus, relitigation of this issue by Petitioners is prohibited.

contrary to Petitioners' claim (Petition App. at 2, 8), the South Carolina Supreme Court's decision does not conflict with this Court's holding in *Amchem*.[15]

4. The Fairness Of The *Cox* Settlement Was Litigated And Decided

The record below shows that the fairness and reasonableness of the *Cox* Settlement was fully litigated and finally decided by the *Cox* court. For example, in concluding that the *Cox* Settlement is "in all respects fair, reasonable, and adequate and in the best interests of the Settlement Class" (Celanese App. 11a-13a, 25a), the *Cox* court made 73 separate findings of fact and conclusions of law that discussed at length the various aspects of the Settlement. (Celanese App. B.) Before ruling on the issue, the court received extensive briefing on all of these issues, including numerous objections, held numerous adversarial hearings and received significant evidence. All objections, even those which were untimely or subsequently dropped or waived, were considered by the *Cox* court before it rendered its decision. (Celanese App. 26a.) Thus, every issue, regarding every aspect of the fairness or adequacy of the *Cox* Settlement, was litigated and decided by the *Cox* court, and relitigation is barred.

Rather than challenging this record, Petitioners have attempted, as they did below, to collaterally attack the relief provided under the *Cox* Settlement, claiming that the Settlement provides less than $150 per unit.[16] (Petition at 26.) Petitioners

15. Petitioners' citation to *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (Petition at 27), is equally unavailing. There, unlike in *Cox*, the parties sought to certify a *mandatory* settlement class on a limited fund theory under Fed. R. Civ. P. 23(b)(1)(B). In *Ortiz*, the Court rejected the settlement because it failed to "'ensur[e] an ample, inflation-protected fund for the future'" *id.* at 856 (citation omitted), which the *Cox* Settlement does through, among other things, subsequent notices and opt-out periods and retention of claims in the event of exhaustion of the funds.

16. Petitioners erroneously claim that the few polybutylene plumbing-related cases which went to trial against Respondents resulted (Cont'd)

are wrong. The relief provided to class members is a replacement of leaking polybutylene plumbing in any eligible unit, as well as reimbursement for any damages caused by the leaks, regardless of the cost. (Celanese App. 17a.) As a result, the *Cox* Settlement offers complete relief to class members, and is many times higher than the per unit figure claimed by Petitioners here.

II. THE SOUTH CAROLINA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT, ANY UNITED STATES COURT OF APPEAL, OR ANY OTHER STATE COURT OF LAST RESORT ON THE SAME MATTER

Notwithstanding Petitioners' arguments (Petition at 1-2, 9), the South Carolina Supreme Court's decision does not conflict with any decision of this Court, any court of appeal, or any other state court of last resort on the same matter.

A. *The South Carolina Supreme Court's Decision Does Not Conflict With Any Decision Of Any Court Of Appeal Or State Court Of Last Resort To Address The Same Matter In the Context Of A Class Action*

The courts of appeal and state courts of last resort which have recently addressed the issue in the class action context have held uniformly that in determining full faith and credit the permissible scope of review is limited to whether all relevant matters set forth in the foreign judgment were fully litigated and finally decided by the foreign court.

(Cont'd)
in large payouts to plaintiffs. (Petition at 26.) However, Petitioners ignore that most of those cases were either reversed, in whole or in part, on appeal, or were settled for amounts comparable to *Cox* relief and for far less than the verdicts. *See Gawara v. United States Brass Corp.*, 74 Cal. Rptr.2d 663 (Cal. Ct. App. 1998); *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644 (Tex. 1996); *United States Brass Corp. v. Andraus*, 1993 WL 313208 (Tex. App. 1993).

1. The United States Court Of Appeals For The Ninth Circuit

This very issue was addressed by the Ninth Circuit in *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999) where the court held that:

> Limited collateral review would be appropriate, therefore, to consider whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a "full and fair opportunity" to litigate the claim or issue. This review would not, however, include reconsideration of the merits of the claim or issue.

Id. at 648-49 (citation omitted).

The factual scenario in *Epstein* is strikingly similar to the one at issue here, and even Petitioners' counsel concedes that the facts are "almost on all fours" with this case. Specifically, that action, like this action, concerned the determination of whether a class action settlement approved by a state court was entitled to full faith and credit. There, like here, the plaintiffs argued that *Shutts* created a "largely unfettered right to challenge collaterally the adequacy of representation in class actions." *Id.* at 647. In soundly rejecting this argument, the Ninth Circuit held, like here, that:

> *Shutts* does not support the broad collateral review that the Epstein appellants seek. . . . Simply put, the absent class members' due process right[s] [are] protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court. . . . Due process requires that an absent class member's right[s] be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review.

Id. at 648 (citations omitted). Thus, the Ninth Circuit held that a court reviewing a class action settlement approved by a foreign court may only determine whether the matters central to the judgment, including the *Shutts* due process factors, were litigated and decided by the foreign court.

2. The United States Court Of Appeals For The Second Circuit

Contrary to Petitioners' assertion (Petition at 16), the South Carolina Supreme Court's decision does not conflict with the Second Circuit's holding in *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd in part per curiam by an equally divided Court*, 539 U.S. 111 (2003).

There, unlike here, an absent class member whose injury arose after the depletion of the settlement fund sought to collaterally attack the prior court's determination that the class had been adequately represented. *Id.* at 257-58. In permitting the plaintiff to collaterally challenge the adequacy of representation finding, the Second Circuit explained that "neither this Court nor the district court has addressed specifically the adequacy of representation for those members of the class whose injuries manifested after depletion of the settlements funds."[18] *Id.* Thus, consistent with decisions of this Court, the Second Circuit held only that collateral review was appropriate where, unlike in *Cox*, a matter central to the prior judgment was not fully litigated and finally determined in the prior proceeding.[17] Indeed, the Second Circuit noted that this outcome was entirely consistent with *Epstein* without adopting the Ninth Circuit's holding. *Id.* at 258 n.6.

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17. Petitioners' claim notwithstanding (Petition at 9, 16), the South Carolina Supreme Court's decision does not conflict with *State v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003). To the contrary, the Vermont Supreme Court ruled that collateral review is appropriate where, unlike in *Cox*, a matter central to the prior judgment had not been fully litigated and decided. *Id.* at 1017-20 ("We do not accept that the Alabama court litigated the issues on which jurisdiction over the class members depended. Indeed, the essential deficiency in the fairness proceeding is that the court did not litigate them").

Moreover, *Stephenson* is inapposite. Unlike in *Stephenson*, Petitioners here do not claim that they could not obtain relief under the *Cox* Settlement. To the contrary, Petitioners here admit that they could have obtained relief under the *Cox* Settlement, but were simply dissatisfied with the relief offered. (*See* Petition App. at 77a.) Further, the problem faced by the Second Circuit in *Stephenson* does not exist here because the *Cox* Settlement fund has not been exhausted. In any event, if future eligible claimants are not afforded the relief provided by the *Cox* Settlement because the fund is exhausted, those claimants retain their rights against Celanese and Shell, and may pursue their claims with any applicable statutes of limitations or repose tolled. (Celanese App. 17a.)

3. The United States Courts Of Appeals For The First And Third Circuits

Both the First and Third Circuits have found that class action settlements approved by state courts are entitled to full faith and credit when the relevant matters have been fully litigated and finally decided by the state courts. For example, in *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991), the First Circuit held that the Full Faith and Credit Act barred the plaintiffs from collaterally attacking a class action settlement approved by the Delaware Chancery Court because "[t]he Delaware courts, affording all the prophylaxis which the Due Process Clause commands, adjudicated the question of whether appellants had a right, or should have been allowed, to opt out of the settlement." *Id.* at 33. The court ruled further that if the plaintiffs "were still dissatisfied with the Delaware judgment, their recourse was to the United States Supreme Court by means of certiorari, not to the lower federal courts in the vain pursuit of back-door relief." *Id. See also Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 57 (1st Cir. 2004) (finding that a class action settlement approved by a Minnesota state court was entitled to full faith and credit because the Minnesota "court determined that the class had been adequately represented and that the settlement was fair . . .").

Likewise, in *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir. 1994), the Third Circuit ruled that a class action settlement approved by a Delaware state court was entitled to full faith and credit. There, like here, the plaintiffs collaterally challenged the settlement, seeking to relitigate, among other things, the adequacy of representation and fairness of the settlement. However, the Third Circuit found that those issues had been "conclusively determined in the Delaware proceeding," and thus relitigation was prohibited. *Id.* at 1562-63.

4. The Ohio Court Of Appeals

The Ohio Court of Appeals' decision in *Fine v. America Online, Inc.*, 743 N.E.2d 416 (Ohio Ct. App. 2000), *cert. denied*, 532 U.S. 942 (2001) is the only state court of appeal decision Celanese located that addressed this issue in the context of a class action judgment. There, like here, absent class members sought to collaterally attack a class action settlement approved by an Illinois state court, arguing that they were entitled to litigate *de novo* the Illinois court's findings of adequacy of notice and representation. *Id.* at 420. However, the court found that "[m]odern constitutional jurisprudence requires that the absent class members' rights to due process be protected not by substantive collateral review, but rather by the application of appropriate procedures in the certifying court and by the courts that review its determinations." *Id.* (citations omitted). Accordingly, the court ruled that:

> [T]he appropriate collateral review involves an examination of *procedural* due process and nothing more. As long as procedural safeguards are established by the law and employed, absent class members' objections to the determinations of the certifying court may be properly remedied on appeal within the forum state's judicial system and to the United States Supreme Court.

Id. at 421 (emphasis in original). As the court explained in granting full faith and credit, "[t]o hold otherwise would create a form of collateral review that is inconsistent with both the

spirit of the class-action mechanism and the principles at the very core of the full faith and credit doctrine." *Id.*

B. *The South Carolina Supreme Court's Decision Does Not Conflict With Any Other Decision Of Any Court Of Appeal Or State Appellate Court Outside The Class Action Context*

The South Carolina Supreme Court's decision does not conflict with any decision of any court of appeal or state court of last resort on the same matter outside the context of a class action:

1. The United States Court Of Appeals For The Fifth Circuit

The Fifth Circuit has held unequivocally that "a wide-ranging de novo examination of jurisdictional questions may be inconsistent with full faith and credit principles. The scope of review that one court may conduct to determine a foreign court's jurisdiction to render a challenged judgment is limited." *A.L.T. Corp. v. Small Business Admin.*, 801 F.2d 1451, 1460 n.17 (5th Cir. 1986). Consistent with this Court's holdings, the Fifth Circuit has ruled that this limited scope of review consists only of whether the relevant matters set forth in the foreign judgment were fully litigated and finally decided. *Id. See also Fidelity Standard Life Ins. Co. v. First Nat'l Bank & Trust Co.*, 510 F.2d 272, 273 (5th Cir. 1975) ("Because the jurisdictional issue was fully litigated in the original court, this issue may not be relitigated by way of collateral attack").

2. The United States Courts Of Appeals For The Tenth And Eleventh Circuits

While the Tenth and Eleventh Circuits have not stated the proper scope of review in determining full faith and credit, both circuits have confirmed the settled rule that a foreign judgment is entitled to full faith and credit where the relevant matters were litigated and decided in the foreign court. *See, e.g., Read v. Dunn*, 2000 U.S. App. LEXIS 16482, *7 (10th Cir. July 14, 2000) (ruling that "unless the defect appears on the face of the

record," a reviewing court must give full faith and credit to a foreign court's judgment); *Harbuck v. Marsh Block & Co.*, 896 F.2d 1327, 1329-30 (11th Cir. 1990) (in rejecting the plaintiff's request to "revisit" the foreign court's finding of jurisdiction, the court held that "[w]here the question of personal jurisdiction has been fully and fairly litigated and finally decided in the state court . . . that decision must be accorded full faith and credit in the federal court").

3. State Courts Of Last Resort

From Celanese's review, it appears that every state court of last resort to have recently addressed the issue outside the context of a class action has confirmed the settled rule that a foreign judgment is entitled to full faith and credit where the relevant matters were litigated and decided in the foreign court. For example, in *Northern Ind. Commuter Transp. Dist. v. Chicago Southshore & S. Bend R.R.*, 685 N.E.2d 680 (Ind. 1997), the Supreme Court of Indiana held that the "scope of review" on a motion to accord full faith and credit to a foreign court judgment is "'limited'" to whether the relevant matters were "'fully considered' and 'finally determined' in the first state . . . ." *Id.* at 686 (citation omitted). As such, the court rejected a challenge to the foreign court's jurisdiction because the issue had been "fully briefed and argued and conclusively decided" in the foreign court, and thus a reviewing court was "not free to second guess" the foreign court's decision. *Id.* at 687-88. *See also Smith v. Mason*, 964 P.2d 743, 746 (Mont. 1998) ("the doctrine of res judicata precludes a second court from considering jurisdiction so long as the first court fully and fairly considered the issue. . . ."); *Hamilton v. Patterson*, 115 S.E.2d 68, 70 (S.C. 1960) ("full faith and credit . . . precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based") (citation omitted); *Mayhew v. Caprito*, 794 S.W.2d 1, 2 (Tex. 1990) (same).

CONCLUSION

Under established law, the Full Faith and Credit Clause permits a reviewing court to conduct only a limited collateral review to determine if the matters central to the foreign judgment were fully litigated and finally decided in the foreign court. As the South Carolina Supreme Court explained, "[w]ithout limited review, a nationwide class action could be vulnerable to collateral actions in the 49 other states in which it was not litigated initially." (Petition App. at 17a.) The record below demonstrates conclusively that all relevant matters set forth in the *Cox* Final Order and Judgment, including jurisdiction, adequacy of notice, adequacy of representation and the fairness and reasonableness of the settlement, were fully litigated and finally decided after several adversarial proceedings and on a voluminous record by the Tennessee court. Therefore, the South Carolina Supreme Court held correctly that the *Cox* Final Order and Judgment is entitled to full faith and credit, and that Petitioners' claims were properly dismissed. The South Carolina Supreme Court's decision is fully consistent with the established authority of this Court and the other federal and state appellate courts to have addressed similar issues, and thus further review of this matter is not warranted. For these reasons, Celanese respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — FINAL JUDGMENT OF THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE AT UNION CITY, TENNESSEE DATED AND FILED NOVEMBER 17, 1995

IN THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE AT UNION CITY, TENNESSEE

Civil Action No. 18,844

CLASS ACTION

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated,

Plaintiffs,

v.

SHELL OIL COMPANY, d/b/a SHELL CHEMICAL COMPANY, and HOECHST CELANESE CORPORATION,

Defendants.

FINAL JUDGMENT

This matter is before the Court on motion by the parties for final approval of their proposed settlement as set forth in the Settlement Agreement filed July 31, 1995, as amended by an Amendment dated October 6, 1995, a Second Amendment dated October 24, 1995, and a Third Amendment

dated November 9, 1995 (the "Agreement"). Also before the Court is the Application of Class Counsel for Award of Attorneys' Fees and Expenses, and Awards to the Representative Plaintiffs (the "Application").

A hearing on the motion and Application was held on November 8 and 9, 1995, pursuant to the Court's Order of July 31, 1995, granting preliminary approval of the settlement and the August 7, 1995, order conforming the class definition, under procedures set forth in the August 24, 1995, Order Approving Forms of Notice, Scheduling Fairness Hearing and Setting Opt-out and Objection Dates.

This Final Judgment is entered pursuant to a Final Order Approving the Class Action Settlement, Attorneys' Fees and Expenses, and Awards to Representative Plaintiffs (the "Final Order") which is entered together herewith. The Court has determined that the Class Action Settlement, as encompassed within the Agreement, should be approved as fair, adequate, and reasonable to the Settlement Class under Rule 23.05 of the Tennessee Rules of Civil Procedure, and that the Application should be granted.

The Court has further determined that there is no just reason for delay in the entry of final judgment in accordance with the Final Order pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure.

Accordingly, it is **ORDERED** that judgment is hereby entered in accordance with the Final Order.

Appendix A

It is further **ORDERED** that the Settlement Class is defined as follows:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.

The definition of the Settlement Class excludes:

(1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties to *Geno Cioe, et al. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et al. v. Shell Oil Company, et al.*, Case No. 658403, and related combined actions (Case Nos. 640245,

654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in and for the County of San Diego, and all members of the certified classes in those lawsuits.

It is further **ORDERED** that the Court directs that the settlement be consummated in accordance with the terms and conditions of the Agreement.

It is further **ORDERED** that the Amended Complaint and all claims and causes of action asserted therein are dismissed with prejudice with costs to be paid from the settlement fund in accordance with the terms of the Settlement Agreement.

It is further **ORDERED** that, in the event that the settlement does not become final (as more fully defined in the Agreement) in accordance with the terms of the Agreement, then this Final Judgment and the Final Order shall be rendered null and void and be vacated, and the Agreement shall be rendered null and void in accordance with the provisions thereof.

It is further **ORDERED** that, without affecting the finality of the Final Order and this Final Judgment, the Court shall retain continuing jurisdiction over this action and the settling Parties (as more fully defined in the Agreement), including all members of the Settlement Class; the administration and enforcement of the settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of the Settlement Agreement.

It is further **ORDERED** that, subject and pursuant to the terms and conditions of the Agreement, Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action, other than any past, present, or future claim for bodily injury (including wrongful death) and associated emotional distress and mental anguish.

It is further **ORDERED** that, in accordance with the above-described Application and the Funding Agreement referred to in the Agreement, the defendants shall pay Plaintiffs' Class Counsel, as attorneys' fees and expenses, the sum of $45 million, plus interest at the rate applicable to federal court judgments entered on July 31, 1995, for the period from July 31, 1995, until the earlier of July 31, 1996, or when paid.

It is further **ORDERED** that, in accordance with Section 25.1 of the Agreement and with the Funding Agreement referred to in the Agreement, the defendants shall pay the sum of $3,000.00 to each single Representative Plaintiff or Representative Plaintiff married couple.

It is further **ORDERED**, pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, that the Court hereby

DIRECTS the entry of this judgment as a final judgment based upon the Court's finding that there is no just reason for delay notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement as set forth above, and the Court's continuing jurisdiction to provide for supplemental notice (and related proceedings) to potential members of the Settlement Class as to whom the Court previously received requests for exclusion from the Settlement Class.

Dated at Union City, Tennessee, this 17 day of November, 1995.

s/ W. Michael Maloan
W. MICHAEL MALOAN, CHANCELLOR

APPENDIX B — FINAL ORDER APPROVING THE CLASS ACTION SETTLEMENT, ATTORNEYS' FEES AND EXPENSES, AND AWARDS TO REPRESENTATIVE PLAINTIFFS OF THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE, UNION CITY, TENNESSEE FILED NOVEMBER 17, 1995

IN THE CHANCERY COURT FOR
OBION COUNTY, TENNESSEE
AT UNION CITY, TENNESSEE

Civil Action No. 18,844

CLASS ACTION

OBION COUNTY

Paula Rice
Clerk and Master
D.C. & M.

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated,

Plaintiffs,

v.

SHELL OIL COMPANY, d/b/a SHELL CHEMICAL COMPANY, and HOECHST CELANESE CORPORATION,

Defendants.

Appendix B

FINAL ORDER APPROVING THE CLASS ACTION SETTLEMENT, ATTORNEYS' FEES AND EXPENSES, AND AWARDS TO REPRESENTATIVE PLAINTIFFS

This matter is before the Court on motion by the parties[1] for final approval of their proposed settlement (the "Settlement") as set forth in the Settlement Agreement filed July 31, 1995, as amended by an Amendment dated October 6, 1995, a Second Amendment dated October 24, 1995, and a Third Amendment dated November 9, 1995 (the "Agreement"). Also before the Court is the Application of Class Counsel for Award of Attorneys' Fees and Expenses, and Awards to the Representative Plaintiffs (the "Application"). A duly noticed hearing on the motion and Application was held on November 8 and 9, 1995, (the "Fairness Hearing") pursuant to the Court's Order of July 31, 1995, granting preliminary approval of the Settlement and the August 7, 1995, order conforming the class definition (collectively the "Preliminary Approval Order"), under procedures set forth in the August 24, 1995, Order Approving Forms of Notice, Scheduling Fairness Hearing and Setting Opt-out and Objection Dates.

Notice of the Fairness Hearing was given to potential class members nationwide in accordance with the Preliminary Approval Order and the Court approved notice program. Voluminous pleadings and briefs were submitted by the settling parties in support of the Settlement and in response

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1. The parties are the named individual and representative *Cox* plaintiffs, on behalf of the certified Settlement Class, and defendants Shell Oil Company d/b/a Shell Chemical Company and Hoechst Celanese Corporation.

to all objections and motions filed regarding the Settlement, including the various objections and related papers filed by objector Tony Martin, *et al.*, and affiliated objectors through their attorneys (the "Martin Objectors"). The parties, numerous interested members of the Settlement Class, and others appeared at the Fairness Hearing, either individually or by their respective attorneys. The Court heard and considered evidence in support of the proposed Settlement. This evidence included live testimony, affidavits, documentary and video presentations, as well as oral representations by various attorneys. The attorneys for the parties and others were heard. An opportunity to be heard was given to all other persons requesting to be heard in accordance with the Preliminary Approval Order. This included a significant number of members of the Settlement Class who, in some instances, had traveled great distances from other states to appear and participate in the Fairness Hearing, who were invited to and did make statements and ask questions regarding the terms of the Settlement and the relief it provides.

As more fully set forth below, the Court has determined that the notice given to members of the Settlement Class certified in the Preliminary Approval Order fully and accurately informed the Settlement Class members of all material elements of the proposed Settlement; was the best notice practicable under the circumstances; was valid, due, and sufficient notice to all Settlement Class members; and complied fully with Rule 23 of the Tennessee Rules of Civil Procedure, the United States Constitution, and any other applicable law.

Appendix B

OPINION

The Court has greatly benefited from the fine briefs and oral arguments of the attorneys in this case, all of whom are worthy adversaries, and appreciates the manner in which they have conducted themselves in this most difficult, complex, and hotly contested litigation. Great credit must be given to Judge Richard Silver of Monterey County, California for his initiative to coordinate a settlement conference with the *Cox* and *Spencer*[2] parties. The revised *Cox* Settlement is due, in no small part, to his efforts. The Court also commends Judge Hardaway of Greene County, Alabama, for his willingness to join in this unprecedented effort by three state courts to coordinate and settle competing national class actions. As to the settling parties, the plaintiffs, the plaintiff class, Shell Oil Co., and Hoechst Celanese Corp., the Court acknowledges that if it were not for your recognition of this opportunity to reach a global settlement of these issues, all of these efforts would have been in vain. You have put aside your armor and your hardened positions from years of battle and have finally made peace.

Compromises are favored in the law. Neither this Court, nor any court, has the resources to fully litigate all issues, nor is it always fair to the parties to do so. The time, cost, and lack of finality of protracted litigation require certain matters to be settled. The polybutylene plumbing litigation's time has come. Closure is not only appropriate, but timely.

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2. *Spencer, et al v. Shell Oil, et al,* Case No. CV 94-074, Circuit Court of Greene County Alabama, Honorable Eddie Hardaway, Jr., presiding.

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The parties to this and to the many other individual and group cases that have comprised the polybutylene plumbing litigation have fought long and hard with varying degrees of success and defeat; however, the affected party, the consumer, has seen very little benefit from these efforts. The *Cox* settlement agreement is a compromise. In every compromise, each side must abandon or set aside its ideal position and reach an agreement that is fair and reasonable to all concerned under the circumstances, and not insist on terms only beneficial to one party. The *Cox* settlement is not perfect. I would have preferred that the Agreement include no leak requirements and a larger claims "window" for class members. The Court has some concern the $75 million cap on past damages may not adequately pay all past damages in full; however, these concerns must be weighed in light of the numerous unique advantages to the consumer that the *Cox* settlement does provide.

The Court finds the Settlement is fair, adequate and reasonable.The $950 million dollars is a minimum contribution of the defendants to those who are affected by polybutylene plumbing. When the Court initially gave preliminary approval to the proposed Settlement, this factor was the leading factor in granting that approval. As counsel for the parties have confirmed at various times in open court as the hearings have progressed in this matter, the initial funding commitment (now increased to $950 million) may ultimately be more if funds are expended and provided by the defendants and if other responsible parties contribute to the fund in the future. Due to the uncertainty of the size of the class and how many claims will ultimately be filed, this Court would not have approved a "limited fund" which

provided less than full relief while demanding full release. If the worst case does present itself, that is, if the class is as large as six million people, all claims are presented, and the fund is totally expended; the only prejudice to the consumer will be the delay caused by the filing of claims and payment of funds. The Agreement tolls statutes of limitations for class members. The Agreement provides that any consumers not fully reimbursed or compensated under the terms of the Agreement would be able to pursue all legal and equitable claims and remedies (including punitive damages) individually and as a class.

The Court finds the notice program is excellent. As specified in the findings below, the evidence supports the conclusion that the notice program is one of the most comprehensive class notice campaigns ever undertaken. The Court is satisfied that all reasonable efforts have been made to reach affected consumers.

The Court must also consider the complexity, the expense, and the likely duration of these proceedings if settlement were not reached and approved. The Court must weigh the benefits of settlement against the likely outcome of litigation. As the Court has already stated, much has been spent and much has been done over the past years in group and individual polybutylene pipe litigation across the country, but not much has been accomplished for the benefit of the consumer. The claims in *Cox* and *Spencer* each have their own legal problems, which, if fully litigated, would delay the ultimate resolution of these cases for many years to come. If litigated, complex legal issues would be presented, such as statutes of limitations and repose, choice of appropriate

state laws, liability, and measure of damages. All of these issues, if litigated and appealed, could clog the courts across the country for years to come. There is a question as to whether some state courts would give full faith and credit to another state court's determination of these issues.

It is an important aspect of the Settlement that the plaintiffs' attorney's fees and costs are paid by the defendants in addition to the settlement fund, and are not deducted from the settlement fund. In the absence of a comprehensive Class Settlement now, as presented here in *Cox*, after the resolution of the contentious issues described above, any ultimate recovery available for consumers would be reduced by attorney's fees. These normally range from a third to forty percent. None of this delay, risk, mounting transaction costs and reduction of recovery by individual fees would be in the long-term interest of the consumer. In *Cox*, the attorney's fees requested are much less: approximately five percent of the settlement fund; moreover, unlike a typical contingent fee, they are not paid from the fund. The request for fees in the case is approved. The Court finds that they are reasonable under the circumstances, and the Court is pleased to approve them.

The Court is pleased with the reaction of the class members to the proposed Settlement. The Court is greatly comforted by the small number of individual opt-outs, the removal of objections by *Spencer* class counsel and by Tony Martin, who is represented by the Fleming group, and the support expressed by the consumers who testified at the Fairness Hearing. The Court finds that the Consumer Plumbing Recovery Center ("CPRC") claims facility

procedures which have been outlined to the Court and which are provided for in the Agreement, appear to constitute a simple, consumer-friendly and efficient method of adjusting the claims in this case.

The discussions and negotiations that ultimately lead to the settlement presented for Court approval were, from all reports and from the Court's own observation, intensive, exhaustive, and often heated. The Court finds the Agreement is the result of good faith, arms-length, and non-collusive negotiations. The Agreement is fair, adequate, and reasonable under the circumstances, and it is approved.

ADDITIONAL FINDINGS AND CONCLUSIONS

The entire matter of the proposed Settlement and the Application having been fully heard and duly considered by the Court, the Court further FINDS and CONCLUDES, in addition to the findings and conclusions in the foregoing Opinion, as follows:

1. The polybutylene plumbing litigation has been pending, in various forms and in various courts around the country, for more than a decade. It has included individual cases, cases with large numbers of individual plaintiffs, and putative nationwide or statewide class actions brought in federal court and in many state courts.

2. The first nationwide polybutylene plumbing class action was filed in September 1993 by lawyers who are now members of the team of *Cox* Class Counsel. The action,

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Robert Beeman, et al. v. Shell Oil Company, et al., No. 93-047363, was filed in a state district court in Harris County, Texas.

3. Over the course of many months of intensive negotiations, involving a neutral mediator at many critical junctures, a tentative settlement of the *Beeman* case was achieved in October 1994. In February 1995, however, the Texas state court denied preliminary approval of that settlement without comment.

4. After the Court in this case certified the nationwide class on June 13, 1995, *Cox* Class Counsel joined with the plaintiffs' attorneys in the *Beeman* action to prosecute this case for the benefit of mobile and site-built homes with polybutylene plumbing across the country.

5. Collectively, this combined team of Class Counsel included highly qualified and well-regarded lawyers with extensive class action and complex litigation experience, as well as lawyers with vast experience in polybutylene plumbing litigation.

6. Class Counsel then were able to negotiate a settlement generally patterned after that originally arrived in *Beeman*, although the minimum funding commitment was $100 million greater, other features were added, and only two of the three *Beeman* defendants, Shell and Celanese, were involved.

7. Because of the pendency of a nationwide class action in Greene County, Alabama, and of other polybutylene actions

around the country, with many brought as class actions, including an uncertified case for a putative statewide mobile homeowner class in the Superior Court of Monterey County, California,[3] Judge Hardaway and this Court agreed that Judge Silver in Monterey would further the cause of final resolution of polybutylene plumbing litigation if he was appointed to serve as a settlement judge for all three courts.

8. Judge Silver issued an October 12, 1995 *Order Setting Settlement Conference* with the endorsement of this Court and Judge Hardaway, to convene the coordinated settlement process. Other state courts with proposed class actions were asked, by the parties and/or by Judge Silver, to dismiss or stay their proceedings in deference to the coordinated settlement effort in order to give it an opportunity to succeed, undistracted by collateral litigation.

9. Accordingly, from October 23, 1995, through November 7, 1995, the day before the Fairness Hearing in this Court, intensive and continuous global settlement negotiations were conducted among *Cox* Class Counsel, the *Spencer* counsel, and defendants' counsel and representatives through the mediation and supervision of Judge Silver.

10. As a result of these concentrated efforts, a comprehensive settlement was reached, resulting in significant enhancements to the Settlement as it was originally presented to the Court and preliminarily approved on July 31, 1995.

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3. *Meers, et al vs. Shell Oil, et al,* Case No. M 30590, Superior Court of the State of California, County of Monterey, Honorable Richard M. Silver, presiding.

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11. The resulting Settlement, documented and as presented for final approval at the Fairness Hearing, provides consumers with a recovery program consisting of reimbursement of otherwise unreimbursed expenses for repairs to and replacement of leaking polybutylene plumbing systems and property damage caused by such leaks, as well as an extensive program for replacement of such leaking plumbing systems.

12. Some of the features of this Settlement are these:

a. Free replacement of polybutylene plumbing systems installed since January 1, 1978, if two or more qualifying leaks occurred before August 21, 1995, or if only one such leak occurs either in the two years following that date or during a period (of from 10 to 16 years, depending on the type of structure) following installation of the system;

b. Reimbursement of the unreimbursed expenses of plumbing repairs, replacements, and property damage from January 1, 1978, to August 21, 1995, up to $75 million will be distributed, *pro rata* if necessary, for these expenses; and property damage after August 21, 1995, at 100 cents on the dollar;

c. An unlimited funding potential, with the defendants committed to to initially provide up to $950 million for the relief; if additional funds are required, the defendants will either provide them, or litigation will be resumed with all applicable statutes of limitations and repose tolled in the interim;

d. Provision for additional relief to eligible members of the Settlement Class who experience special needs in connection with qualifying leaks;

e. A comprehensive notice program, including notice every three years through the life of the program, which ends in 2009; and

f. The payment of class counsel's attorneys' fees and expenses in addition to the $950 million reserved for relief for the Settlement Class.

13. The Court is not aware of any other class action settlement with successive notices as provided in the *Cox* Settlement.

14. In reaching this Settlement, the defendants have foregone very significant defenses and issues which could have precluded or limited liability as to some or many class members' claims. These include the statutes of limitations and repose, selection of the appropriate states' laws applicable to various issues, the "economic loss" limitation on recoveries of the type sought here, the lack of privity between the members of the Settlement Class and the defendants, the fact that many of the members of the Settlement Class purchased their structures "as is," and, of course, the risk that plaintiffs would not be successful in proving their allegations. In agreeing to this Settlement, the defendants have displayed commendable corporate responsibility, responsiveness, and good will toward consumers.

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15. The Court appointed Rust Consulting, Inc. and Kinsella Communications Ltd. as class notice providers in this case. Richard Redfern, president of Rust Consulting, and Katherine Kinsella, president of the communications firm bearing her name, testified at the Fairness Hearing. The Court also considered Ms. Kinsella's affidavit and the affidavit of Jeffrey Dahl, Executive Vice President of Rust Consulting, in connection with their activities as notice providers.

16. *Cox* Class Counsel and the notice providers worked with Todd B. Hilsee, an experienced class action notice consultant, to design a class notice program of unprecedented reach, scope, and effectiveness. Mr. Hilsee was accepted by the Court as a qualified class notice expert at an earlier hearing to approve the commencement of the notice program. He testified at the Fairness Hearing, and his affidavit was also considered by the Court, as to the operation and outcome of this program.

17. The above-mentioned individuals provided documents, information, and affidavits at the outset of the notice period that assisted the parties in designing, and the court preliminarily approving for implementation, a singularly comprehensive and creative notice program.

18. Beginning in August, 1995, and extending into October, 1995, an extensive notice effort was undertaken in this case to implement the Court approved notice program specified in the Preliminary Approval Order.

19. Since not all Settlement Class members were known or readily identifiable, the notice program implemented in

this case combined multimedia publication (newspapers, magazines, radio and television), individual mailed notice, ongoing press and media outreach, and a toll-free telephone information service. The purpose of the program was to make potential Settlement Class members aware of the Action and the Settlement, and to encourage them to identify themselves to the notice providers, so they could receive further written notices and information, and be placed on the notice providers' Settlement Class member database.

20. Commencing on or before August 21, 1995, which is the Initial Notice Date as specified in the Agreement, more than 5.6 million copies of the Court approved Notice of Class Action and Proposed Settlement were mailed, by first class mail or overnight service, to Settlement Class members in accordance with the Preliminary Approval Order.

21. During September, 1995, the Court approved summary notice was published in *Parade* Magazine, *USA Weekend, People* Magazine, and *TV Guide* in accordance with the Preliminary Approval Order. The combined circulation of these consumer publications and national magazines is over 73 million. During August and September, 1995, Court approved notice appeared twice in Friday editions of *USA Today*, with combined circulation of over 4.7 million.

22. Also during September, 1995, the Court approved summary notice appeared in 201 daily and weekly newspapers in 13 targeted states (Alabama, Arizona, California, Colorado, Florida, Georgia, Louisiana, Maryland, Nevada, North Carolina, South Carolina, Texas, and Virginia) and the District of Columbia. The combined circulation of

these newspapers exceeds 23.6 million. In addition, the notice appeared in Spanish in 38 Hispanic newspapers, with a combined circulation over 3 million, in 29 media markets during September, 1995. Moreover, the notice appeared in 247 daily, weekly, bimonthly, and monthly African-American newspapers with a combined circulation of nearly 6 million.

23. Notices were also published in the October, 1995, editions of various trade publications, comprising a total circulation of 244,000.

24. A 30-second spot television notice was produced and appeared 213 times from August 21, 1995, through September 3, 1995, on national and cable television, including on such networks as ABC, NBC, CBS, TNN, CNN, and TNT. During the same period, a 30-second Spanish language television notice appeared 18 times on the Univision Network, a popular Spanish language network.

25. A press release, a media advisory, a public service announcement, a video news release, a radio news release, and a press kit were all prepared and disseminated as part of the notice program in this case. The press release went to 2,000 newspapers, wire services, magazines, and broadcast points across the United States through PR Newswire. The press release and media advisory were also disseminated to 469 media outlets, specifically targeting consumer reporters and media in the top 250 media markets and 84 local daily newspapers in the 13 targeted states and the District of Columbia. 142 outlets, with a combined circulation of more than 14.5 million, have confirmed using the press materials to publish articles. It is estimated that the

public service announcement was broadcast by radio stations yielding nearly 2.9 million gross impressions; an additional 5.5 million impressions are estimated from the broadcast of the radio news release. The video news release was used by at least 21 outlets with combined viewership of more than 1.7 million. Finally, a two-column article was provided to 10,000 daily and weekly newspapers.

26. Court approved notice forms were disseminated through various online computer services, including CompuServe, Prodigy, and America Online, and with Legal Link on the Internet.

27. The various forms of published notice provided recipients with a toll free "800" telephone number to which potential Settlement Class members could call to obtain further information and to request the full notice packet to be mailed to them. The telephone message was updated as the notice program progressed, and commonly raised questions were answered by live operators, in English or Spanish as required by the caller. The parties prepared and updated scripts and information by which the operators were able to provide the general information commonly requested by callers.

28. The toll-free telephone facility established for notice purposes in this case received more than one million telephone calls in response to the published notice program.

29. Over 195,000 requests for a claim form have been received by the notice providers.

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30. Mr. Hilsee demonstrated, by affidavit and in live testimony at the Fairness Hearing, a number of significant facts regarding the reach and effectiveness of the notice. The national media campaign reached an extraordinarily high percentage of United States adults aged 35 years and over: approximately 114 million individuals, or 92.11 % of this population. Each of these adults was exposed to the national media notice an average of 4.01 times. The national media campaign also reached approximately 151 million persons in the United States aged 25 years and over, representing 90.88 % of this population. Each of the individuals in this larger, secondary target group was reached an average of 3.76 times by the national media notice, a frequency that also exceed the primary target reach in other class actions. These are higher reach and frequency statistics than have been found adequate by courts in other class actions. These data do not include the reach of the notice campaign through means other than the national paid notice campaign, such as the television and print notices targeted to Hispanic and African-American media, the local newspaper notices, the non-paid media and direct mail notices to millions of Settlement Class members.

31. Multifaceted notice programs like that implemented in this case have been approved by other courts and utilized successfully for similar purposes in large consumer or product class actions such as this one, where most class members are not individually identified at the outset. *See, e.g., In re Domestic Air Transportation Antitrust Litigation,* 141 F.R.D. 534 (E.D. Pa. 1992); 148 F.R.D. 297 (E.D. Pa. 1992); *In re Silicone Gel Breast Implant Products Liability Litigation,* MDL 926 (N.D. Ala. 1994); *Roberts v. Bausch & Lomb, Inc.,* 94-C-1144-W (N.D. Ala. 1995).

32. As other courts have done with respect to the less comprehensive notice programs they approved, this Court finds that the notice program described above, as designed and implemented, met and exceeded the requirements of the United States Supreme Court, Tennessee's Rule 23, due process and the Constitution, as construed in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and its progeny.

33. Thus, the best notice practicable under the circumstances has been provided to members of the Settlement Class. That notice accurately and adequately advised them of this action; the proposed Settlement and its terms, features, and benefits; their rights and options; and the applicable procedures and deadlines for exercising them.

34. A full opportunity has been provided to the members of the Settlement Class to participate in the Fairness Hearing, both orally and by way of written submission to the Court.

35. The Court previously found the requirements of Rule 23 of the Tennessee Rules of Civil Procedure were met and certified a nationwide class for litigation and trial purposes in the Order of National Class Certification. While such certification was and is contested by the defendants, they have agreed to class certification for settlement purposes, to promote a comprehensive, classwide resolution of polybutylene pipe litigation.

36. The numerosity, typicality, commonality, and adequacy requirements of Rule 23.01 of the Tennessee Rules of Civil Procedure are satisfied as to the Settlement Class in connection with the Settlement in this case.

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37. In accordance with Rule 23.02(3), common issues of fact and law predominate and make certification of the Settlement Class for settlement purposes efficient and appropriate. The members of the Settlement Class have been afforded the right and opportunity to exclude themselves from the Settlement Class.

38. The settlement encompassed within the Agreement is in all respects fair, reasonable, and adequate and in the best interests of the Settlement Class.

39. The Court-approved notice program provided clear and simple procedures and instructions for the submission of objections by or on behalf of Settlement Class members. For example, paragraph 10 of the Court-approved *Notice of Class Action and Proposed Settlement* required objections to be submitted, in writing, postmarked not later than October 20, 1995, and further stated, "if you do not comply with the procedure and the deadline stated herein, you may not be entitled to be heard at the Fairness Hearing or to otherwise contest the approval of the Settlement, or to appeal from any orders or judgments of the Court entered thereon." All objections, however styled, that failed to comply with the procedures and deadlines set forth in the notice program, are hereby found to be procedurally deficient and are disqualified in accordance with the foregoing statement.

40. The Court has also reviewed the Principles of Agreement dated November 7, 1995, executed by the parties, including the terms applicable to U.S. Brass Corp., Eljer Manufacturing, Inc., and Eljer Industries, Inc. The terms of the Principles of Agreement appear to be reasonable and in

accordance with the efforts being made to seek a global resolution of all litigation pertaining to the issues among the parties. The prior *Cox* settlement was unclear as to the effect of funds received from U.S. Brass Corp., Eljer Manufacturing, Inc., and Eljer Industries, Inc. The revised settlement makes clear that amounts received from U.S. Brass and/or Eljers will add to the minimum fund of $950 million. If that settlement is perfected and approved by the United States Bankruptcy Court, the minimum fund would substantially increase.

41. In independently determining to approve the Settlement and the Application, the Court has considered the substance of all objections to the Settlement, whether timely, qualified or not, including those by the Martin Objectors and others that have since been withdrawn or stricken.

42. Certain objectors have asserted that the proposed Settlement must be reduced by a proposed settlement of claims against du Pont in the *Spencer* case pending in the Circuit Court of Greene County, Alabama, which the objectors characterized as a $120 million settlement.

43. The proposed du Pont settlement has not been approved by the *Spencer* court, and this Court may not speculate whether it will be approved by the *Spencer* court.

44. The proposed du Pont settlement in *Spencer* purports to entitle a claimant to a rebate of 8% of monies the claimant pays for replumbing his or her structure.

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45. The Settlement before this Court, in the minimum amount of $950 million, provides for the assignment of Settlement Class members' claims against du Pont and others to defendants Shell and Celanese.

46. Objectors are incorrect in asserting that the "credit" arising from the assignment reduces the Defendants' contribution to the Settlement. The original *Cox* settlement was $850 million to be paid by the Defendants. The revised *Cox* settlement requires the Defendants to pay a minimum of $950 million to consumers with assignment of rights, against du Pont, regardless of whether du Pont ultimately participates in the settlement. The revised *Cox* settlement substantially increases benefits to consumers.

47. Contrary to objectors' assertions, all interest earned on funds held by the CPRC will be for the benefit of the Settlement Class and will not be credited against the Defendants' obligations under the Agreement.

48. Because of the structure of the Settlement, the Defendants' obligation to fund the CPRC on an ongoing, as-needed basis, and the Defendants' obligation to pay reimbursement for Past Expenses in a reasonable time after the close of the one year claim filing period on August 21, 1996, and any related opt out period that may be necessary under § 4.5.1 of the Agreement, there is no significant ability by the Defendants to delay payments due under the Settlement.

49. Objectors are incorrect in asserting that, even before the Defendants' initial funding commitment was increased

from $850 million to $950 million, the "net funding by Shell and Celanese under . . . the agreement [was) only $547 million."

50. The notice provided to the Settlement Class was neither misleading nor defective.

51. The defendants are each responsible for one-half of the settlement obligations as specified in the Settlement Agreement unless and until the respective liabilities are established by arbitration under the Funding Agreement.

52. The *Cox* Class Counsel have undertaken a reasonable risk that each of the defendant companies will be solvent and capable of fulfilling its obligations under this agreement.

53. Had the plaintiffs settled at separate times with Shell and Celanese, it is highly unlikely that there would ever have been joint and several liability between them.

54. The Settlement is more favorable to the Settlement Class than litigation if it is assumed that one of the defendants will, some years from now, become unable to pay all claims, since the class will receive payment under the Settlement promptly, thereby reducing the number of claimants who would be subjected to proving claims in a bankruptcy.

55. The Agreement provides broad ranging powers for the enforcement of a defaulting defendant's obligations, including the full panoply of equitable powers this Court possesses.

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56. The Agreement expressly provides that the default of one defendant does not exonerate the other defendant of its obligations under the Agreement.

57. Past expenses will be compensated after expiration of one year from August 21, 1995, the Initial Notice Date under the Agreement.

58. Claimants will not, contrary to an objection, be required to wait 14 years to receive their entitled reimbursements or distributions under the Agreement.

59. The so-called exclusion of a "hot water heater leak"—a leak occurring within six feet of piping measured from the take-off at the unit's hot water heater-does not apply to any claim for reimbursement of repair costs and property damage. Thus, the only exclusion is for eligibility for a replumb, and even there, the exclusion applies only if (1) it is the first leak in the unit *and* (2) it can be repaired without cutting into the unit's walls, ceilings, or floors.

60. Therefore, a replumb will be provided under the Agreement even if the hot water heater leak is the first leak, if to repair the leak would require cutting into the walls, ceilings, or floors of the unit. Similarly, there will be a replumb if the hot water heater leak is the second leak in the system.

61. The claimant has the right to select the contractor to do the replumbing and property damage repair work.

62. Nothing in the Agreement abrogates the warranty of work done by the contractors and suppliers of pipe and other components in the replumb.

63. The Agreement permits special relief involving unusual hardship, so long as the CPRC Ombudsman and President concur that such relief should be provided. This provision allows the CPRC to provide relief from a breach of warranty arising out of replumbing work, where the warrantor fails to provide or cannot provide corrective relief. CPRC § VI, E.

64. There is no factual basis for the asserted objection that there is any conflict of interest with respect to the *Cox* Class Counsel.

65. The *Cox* Class Counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case.

66. There is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the *Cox* Settlement.

67. There is no need to provide additional notice to the entire Settlement Class by reason of the revised terms of the Settlement since the Court approved the notices disseminated to the Settlement Class. All changes have been to improve the Settlement over that described in the notices, and none of the changes has an adverse impact on any Class member.

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68. As class action jurisprudence has accumulated, various federal and state courts, in Tennessee and elsewhere, have articulated criteria and factors that courts may consider in evaluating proposed settlements for final approval. *See, e.g., Third Nat'l Bank v. Scribner,* 212 Tenn. 400, 410, 370 S. W.2d 482 (1963); *Clark Equip. Co. v. International Union, Allied Indus. Workers,* 803 F.2d 878, 880 (6th Cir. 1986), *cert. denied sub nom. Jones v. Clark Equip. Co.,* 480 U.S. 934 (1987); *Williams v. Vukovich,* 720 F.2d 909, 922 (6th Cir. 1983); *Bailey v. Great Lakes Canning, Inc.,* 908 F.2d 38, 42 (6th Cir. *1990); In re Warner Communications Sec. Litig.,* 618 F. Supp. 735 (S.D.N.Y. 1985) *aff'd,* 798 F.2d 35 (2d Cir. 1986); *Girsh v. Jepson,* 521 F.2d 153, 157 (3d Cir. 1975). This Court has been guided, generally, by the procedures and criteria recommended in the *Manual for Complex Litigation*, 3d ed. (Federal Judicial Center 1995), §§ 30.4, *et seq.,* since the federal and Tennessee class action provisions and criteria are consistent.

69. Factors that may be considered in assessing the fairness, adequacy, and reasonableness of the proposed settlement include: the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement; the stage of the proceedings at which the settlement is reached; the extent of cumulative discovery or investigation; the nature of the settlement negotiations; the costs, risks, and delays of establishing liability and damages; the views of experienced counsel; the reaction of the class members themselves; the comparison of the settlement's benefits with other settlements or with the alternative of continuing litigation; and whether approval of the settlement is in the class members' and the public

interest. As the above opinion and findings demonstrate, consideration of these and other recognized factors, such as the participation and recommendations of an experienced and able settlement judge and the testing of the settlement's merits in the clash of adversary proceedings, demonstrate the Settlement's entitlement to approval.

70. Expert opinions have been submitted in support of the proposed Settlement. (*See* Opinion of Professor David Rosenberg, Affidavit of Professor Paul H. Rubin). In approving the Settlement, the Court has considered these opinions.

71. The Court will retain jurisdiction and address a supplemental notice program, on a joint motion of the settling parties, to advise all members of the Settlement Class on whose behalf a purported or actual request for exclusion was received of the enhanced Settlement, providing those individuals with a new opportunity to request exclusion from the Settlement Class in light of the enhanced Settlement.

72. There is no just reason for delay in the entry of a final judgment and decree by reason of such supplemental notice and related proceedings or of the retention by the Court of continuing jurisdiction to oversee the implementation and enforcement of the Agreement and Settlement.

73. The Application is fair and should be granted.

Based upon the foregoing, it is hereby **ORDERED, ADJUDGED, and DECREED:**

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1. The Court has jurisdiction over all claims asserted in the Action on behalf of all Settlement Class members and over all parties to the Action, including all members of the Settlement Class.

2. The Settlement Class is defined as follows:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.
>
> The definition of the Settlement Class excludes:
>
> (1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties

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to *Geno Cioe, et al. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et al. v. Shell Oil Company, et al.*, Case No. 658403, and related combined actions (Case Nos. 640245, 654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in and for the County of San Diego, and all members of the certified classes in those lawsuits.

3. All members of the Settlement Class who have not timely elected to be excluded from the Settlement Class are members thereof and are bound by this Order and the Final Judgment being entered herewith.

4. Pursuant to Rule 23.01, Rule 23.02, and Rule 23.03 of the Tennessee Rules of Civil Procedure, the Court confirms the certification of the Settlement Class provided in the Preliminary Approval Order and maintains such certification for purposes of final approval of the settlement.

5. The Class Representatives and Plaintiffs' Class Counsel designated in paragraph 8 of the Court-approved *Notice of Class Action and Proposed Settlement* to represent the Settlement Class are hereby confirmed.

6. The Agreement and the Funding Agreement entered into by the Defendants pursuant to the Agreement are hereby made part of the record in this case and as such shall have the full force and effect of an order of the Court.

7. Pursuant to Rule 23.05 of the Tennessee Rules of Civil Procedure, the Court hereby grants final approval of the

Agreement and the Settlement set forth in the Agreement and finds that it is fair, adequate, and reasonable to the members of the Settlement Class.

8. The objections that were filed, whether timely or not, have been considered and are all overruled.

9. Accordingly, the Court directs that the Settlement be consummated in accordance with the terms and conditions of the Agreement.

10. Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action, other than any past, present, or future claim for bodily injury (including wrongful death) and associated emotional distress and mental anguish.

11. The Complaint as amended, and all claims and causes of action asserted therein are dismissed with prejudice and costs, as provided in the Agreement, to be paid from the settlement fund.

12. The Application is hereby granted. In accordance with the Funding Agreement referred to in the Agreement,

the defendants shall pay Plaintiffs' Class Counsel, as attorneys' fees and expenses, the sum of $45 million plus interest at the rate applicable to federal court judgments entered on July 31, 1995, for the period from July 31, 1995, until the earlier of July 31, 1996, or when paid. In addition, in accordance with Section 25.1 of the Agreement and with the Funding Agreement referred to in the Agreement, the defendants shall pay the sum of $3,000.00 to each single Representative Plaintiff or Representative Plaintiff married couple.

13. In the event that the Settlement does not become Final (as more fully defined in the Agreement) in accordance with the terms of the Agreement, then this Order and the Final Judgment and Decree being entered herewith shall be rendered null and void and be vacated and the Agreement shall be rendered null and void in accordance with the provisions thereof.

14. Without affecting the finality of this Order or of the Final Judgment being entered herewith, the Court shall retain continuing jurisdiction over the Action and the settling Parties (as more fully defined in the Agreement), including all members of the Settlement Class; the administration and enforcement of the Settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of the Agreement.

15. Any disputes or controversies arising with respect to the interpretation, enforcement, or implementation of the Agreement shall be presented by motion to the Court.

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16. Pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, the Court hereby directs the entry of this judgment based upon the Court's finding that there is no just reason for delay notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement and its continuing jurisdiction to provide for supplemental notice (and related proceedings) to potential members of the Settlement Class as to whom the Court previously received requests for exclusion from the Settlement Class.

s/ W. Michael Maloan
CHANCELLOR

ENTERED: November 17, 1995

APPENDIX C — MINUTE ORDER: RECOMMENDATION RE: SPENCER/COX SETTLEMENT DATED NOVEMBER 8, 1995

SUPERIOR COURT OF CALIFORNIA, COUNTY OF MONTEREY

Date: November 8, 1995

Hon. Richard M. Silver

No. M 30590

HELEN MEERS et al

Plaintiffs,

vs

SHELL OIL COMPANY, et al,

Defendants.

Minute Order:
RECOMMENDATION RE: SPENCER/COX SETTLEMENT

RMS/bh

Pursuant to the joint order of SPENCER, COX, and MEERS this court conducted a mandatory settlement conference commencing October 23, 1996 and continuing through November 7, 1996. At the beginning of the sessions the court explained its role and the competing interests. It is important to reiterate several of those points in this minute order.

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This litigation has been ongoing for almost 10 years. Two national class actions are new pending with the plaintiff consumers represented by different counsel. A substantial number of individual cases are pending in Texas. Settlements representing small groups of consumer plaintiffs had been reached in the past. Two settlements in San Diego County have been recently consummated. If global agreement was not reached, this litigation could continue for another 10 years. The competing parties each had substantial disagreements with settlements that had been reached in the two national class actions. It was the stated purpose of these settlement discussions to achieve global resolution of the two national class actions and the individual cases in Texas. If a fair and appropriate global settlement could be reached, I indicated I would recommend its approval to each of the courts presiding over the national class actions and also recommended that the courts presiding over the numerous state class actions accord the settlement full faith and credit.

In addition to the above I also defined my role. It was important that everyone understood that settlement, simply for the purpose of settlement, was not appropriate. Before I would agree to recommend the settlement, it would have to meet a class fairness standard, I felt this to be essential to insure that the resolution of the differences did not turn on attorney fees and, just as significantly, to insure that there was a reasonable relationship between the class settlement and the settlement of the individual cases pending in Texas. Obviously these are also matters to be considered by the judges in the required fairness hearings. I reiterate these points to assure all courts that these concerns were not overlooked and, in fact, guided all my settlement discussions and my recommendations.

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I perceived several points of concern with respect to both national class action settlements and the Texas settlement. They related to the extent of the funding, definitions of the class and qualifying leaks, monitoring performance, and establishing an appropriate basis for differentiating individual settlements in Texas. I also wanted to make sure that any differences with the recent settlements in San Diego were rationally distinguished. Of great concern was finally reaching global settlement so that the consumer plaintiffs across the nation could receive similar relief and begin to receive it soon.

When the discussions started the animosity between counsel and the parties was significant. It was clear that I needed to deal with this issue in order to make significant headway. For this reason I forced people to stay together and continue to discuss the issues, notwithstanding the intensity of these discussions. There is no doubt that I disapproved of some of the discussions. As people began to come together I let it be known, in no uncertain words, that as we moved forward into the next step in the negotiations that I would no longer tolerate these animosities to control the discussions. The change was significant, and we did move forward for purposes of reaching global resolution.

All settlements, by definition, involve compromise. In making these comments it is not my intent to suggest that any counsel's motivations were improper. Each had valid arguments. In summary, it was my intent to aide in finding a rational basis for compromise and at the same time make sure that the settlement met class fairness requirements. I believe it does do so for the following reasons:

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1. Funding: Under COX I questioned whether the fund was sufficient to be a truly national class resolution. If it was insufficient, then the litigation would only be delayed, not ended, and benefits to class members who were not "first in line" could be non-existent. Underfunding would also put those individuals and the judicial system to a risk of 10 more years of litigation. Under COX any funds paid by DUPONT in Spencer would potentially reduce the fund. In addition the agreement was unclear as to the disposition of any funds received from ELGERS. This raised a possibility of substantial potential reductions in the net "fund". On the other hand I also perceived that the funding demands by SPENCER counsel and Fleming were best case scenarios and subject to substantial contrary legal arguments. I also had significant concerns with the SPENCER/DUPONT settlement in that the 8% payment on replumbs would require a consumer to completely replumb and pay and pay the costs, only to receive a small amount in return. As a result my goal was, if possible, merge the two settlements, or, as a minimum, achieve a funding level that would most probably accommodate all persons who have had qualifying leaks, pay persons unreimbursed damages they have suffered, and provide an extended "warranty" period of time, with sufficient probable funding, for those persons suffering qualifying leak during this period. Evaluating the numbers of people responding to both notice programs, the number of individual claimants in Texas, and the numbers of persons already having received benefits through other settlements or relief, I believe the funding under these combined settlements meets this goal and that the probability of further litigation, as a result of underfunding, is minimal. In fact, with the increased funding, addition of the contingent ELGER's funding, and the

independent settlement of the substantial number of claims in Texas, it appears to at least triple the net funds available. I realize that there was no limit in San Diego. However you cannot compare a settlement in a small area with a settlement for the nation. I believe that the funding level here will most probably satisfy this problem. Although all plaintiff's counsel would have liked more, it is unrealistic to believe that the defendants would so agree and still give up the substantial legal and factual arguments that are compromised in this agreement. I believe this settlement represents a fair compromise and greatly diminishes the chance that the fund will run out before completion of its terms.

2. Class definitions and Time periods: COX had a window period of one year. Other settlements had longer periods of time. The definitions of qualifying leaks differ in some of the settlements. COX does not count a hot water leak within 6 feet of the water heater as a first leak toward a replumb unless it requires cutting into a wall, others do. Significantly, any such leak allows for a claim for damages. There are significant factual disputes as to this issue. The limitation is only as to a first leak; it only applies if no cut into the wall is required; the evidence suggests that if the system is defective there is a probability of multiple leaks. This makes sense. The modified settlement does provide for an extended window period from one year to two years. The remainder of the time periods are consistent with past settlements. With the modification of the extended window period, I believe the definition of the class and the qualifications are fair to the consumer class and represent a fair compromise of the competing legal and factual disputes.

3. Monitoring: The settlement as modified creates a new plumbing claims group that will have plaintiff representations from both COX and SPENCER and the defendants. If there are disputes, they are to be resolved by the judges of the national class action or a special master appointed by them. This process insures prompt attention to replumbing and payment of damages, an even handed evaluation of claims and requests for treatment as "exceptional circumstances", and a fair method of resolution of disputes. Of significance is the monitoring of the replumb procedures by plaintiffs counsel and the court.

4. Plaintiff's counsel take on the affirmative obligation to seek the relief provided for in the ELGERS/US Brass settlement and, in the event funding is insufficient, to continue with the litigation. Although I had no doubt that they would do so, I felt it important to affirmatively so represent this in the agreement.

Many of the settlements in these actions have had some differing provisions. In fact they are "trade-offs" depending on the particular situation. I believe this settlement is as good as or better than the settlements in San Diego. This settlement pays for unreimbursed damages, San Diego does not. The final date for submission of claims is significantly longer in this settlement than in San Diego. This settlement includes metal fittings; San Diego does not. Of great significance is the fact that this settlement provides for ongoing monitoring of claims by class counsel and court review in the event of disputes, in addition to the ombudsmen process. I am bothered by the failure to include that in San Diego. In that settlement the ombudsmen review is very limited, and in good

part limited to the information provided by defendants. Review and monitoring by class counsel is also limited. The increased window period here, although slightly less than San Diego, is adequate and compensates for the qualifications on leaks. Overall, the provisions of and improvements to COX/SPENCER, as reflected in the this settlement, leads me clearly to the above conclusion.

In addition to the above, it is important that I emphasize certain points. One lawyer continually proposed that we create a national class action in California and merge the other two into this new action. Although I considered his request, I continually told him I saw no basis or need for this. I told him I was acting only as a settlement judge. This role permitted me to monitor the settlement process and still permit independent review at the fairness hearing by the other respective courts. The Alabama and Tennessee courts are perfectly capable of monitoring the global settlement and are the proper courts to do so. The expenses associated with a whole new notice program would be ill spent and not necessary.

I was particularly sensitive to insuring independent negotiation with the individual Texas claimants and the class so that the former would not control the latter. Although I was seeking global settlement, I made it clear that if an appropriate settlement was reached with the class, and no settlement could be reached in Texas, so be it. In fact Fleming had little or no participation in negotiating the class settlement. There was absolutely NO "private inventory sale" conditioned on class settlement. No doubt I was also concerned that, because of previous animosity, Fleming not

be improperly "cut out"; however, in no way would I permit him, nor did he ever try, to condition class settlement on his settlement. It was I who always kept us concentrated on global settlement.

I believe the individual settlement of his claims is rational and reasonable and does not provide inappropriate "betterments". As indicated above, because of the law relating to class action, monitoring this issue was one of my responsibilities. His clients that will receive some greater relief are all persons who have actively participated in the litigation process. They are all named parties in lawsuits and have participated in some significant way in the litigation, i.e., had their units inspected and/or answered interrogatories or been deposed. All settlements, including those negotiated by attorneys in this case, have acknowledged greater compensation for individuals who have been named class representatives and/or actively participated in the litigation.

I also monitored the proceedings to insure there was no wrongful "trade of rights" between clients. I had a specific discussion concerning some of the precious demands with counsel. It was understood that some demands were a "really best case scenario" that would require extremely favorable findings of disputed facts and law, and there was appropriate room for compromise.

There appears to be a significant misunderstanding of the modified agreements by some counsel. There is no inappropriate switching of "opt outs", nor would I allow it. As noted above there are now substantial improvements reflected in these settlements. With these improvements there

is nothing wrong with merging the processes and allowing individuals another opportunity to consider whether they really want to "opt out".

The fees and costs in this case are significant. Many attorneys participated on all sides. The litigation was hard fought and complex. The fees will be divided between many attorneys and firms. I did not participate in the setting of fees. They do not come out of the fund. Regardless of the amount of fees, as I stated above, I set my own standards of fairness for the class and acted as a buffer against any claim that the class would suffer on account of fees.

It was my intent to try to resolve all disputes. Unfortunately we could not achieve settlement with DUPONT, primarily as a result of their dispute with SHELL and HOECHST CELANESE. I trust and hope that matter can also be settled. As a result all actions will remain pending against DUPONT, and it will be the responsibility of Judge Hardaway to determine the appropriateness of the proposed SPENCER/DUPONT settlement at a fairness hearing.

I commend all counsel for their efforts and hard work and their willingness to ultimately put aside the strong feelings that had separated them and to bring this matter to resolution. I regret that settlement could not be reached with Dupont. I commend the attorneys for Shell and Hoechst Celanese and those corporations for their willingness to proceed with the settlements with the class on the same terms and conditions and not permit the difficulties with Dupont to prejudice the class.

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All of the above will be reviewed by Judge Maloan and Judge Hardaway at the fairness hearing and by each state court judge who considers these matters. All I can say is that I was fully aware of my responsibilities and do not make this recommendation lightly. As I told all counsel, when I put my "stamp of approval" on this settlement, and make this recommendation, it reflects on my credibility. I would not and do not make this recommendation "lightly".

With the assumption that final settlement document will be prepared reflecting the principles of agreement, for the above reasons I recommend approval of the settlement and that all concerned courts accord it full faith and credit.

A copy of the final principles of agreement and settlement document, as reviewed by this court, will be presented to all courts and counsel by the attorneys.

DATED: 11-8-95

s/ Richard M. Silver
RICHARD M. SILVER
Judge of the Superior Court